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In the Supreme Court of the United States

OCTOBER TERM, 1971

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FORD MOTOR COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court on the merits (App. 495a–571a [1]) is reported at 286 F. Supp. 407; its opinion on relief (App. 770a–784a) is reported at 315 F. Supp. 372.

JURISDICTION

The final judgment of the district court (App. 785a–793a) was entered on December 18, 1970. The

[1] "App." refers to the separately bound Appendix. Other references are as follows; "G." denotes a government exhibit; "F.", a Ford exhibit; "G.F.", a stipulated exhibit; "F.R.", a Ford exhibit in the hearing on relief. References not accompanied by citations to the Appendix are to matters not reproduced therein.

notice of appeal was filed on February 16, 1971, and probable jurisdiction was noted on June 7, 1971 (App. 794a; 403 U.S. 903). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Celler-Kefauver Antimerger Act, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 15 of the Clayton Act, 38 Stat. 736, as amended, 15 U.S.C. 25, provides in pertinent part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act * * *.

QUESTIONS PRESENTED

1. Whether the effect of the acquisition by Ford Motor Company of Electric Autolite Company's spark plug manufacturing facilities, its "Autolite" trade name, and its nationwide distribution organization for

spark plugs may be substantially to lessen competition in the manufacture, distribution, and sale of spark plugs, in violation of Section 7 of the Clayton Act.

2. Whether the relief the district court ordered—divestiture of the manufacturing facilities and trade name, and injunctive provisions barring Ford from manufacturing spark plugs for 10 years and from using its own name on spark plugs for 5 years, and requiring it to purchase half its requirements from the divested plant for 5 years—is appropriate.

STATEMENT

This is a direct appeal from a final judgment (App. 785a) holding that appellant, the Ford Motor Company ("Ford"), violated Section 7 of the Clayton Act by acquiring certain assets from the Electric Autolite Company ("Electric Autolite"). The assets included, *inter alia,* the nationally recognized "Autolite" trade name, Electric Autolite's only spark plug plant in the United States, a battery plant, and its nationwide distribution organization for spark plugs and batteries. The appeal is limited to that portion of the judgment relating to spark plugs, which orders Ford to divest the "Autolite" name and the spark plug plant and contains injunctive provisions relating to Ford's manufacture and purchase of spark plugs.

1. THE INDUSTRY AND THE ACQUISITION

Ford is engaged primarily in the manufacture, assembly, and sale of automobiles and related parts and

accessories. For 1960, Ford's sales exceeded 5¼ billion dollars, and its assets exceeded 3¾ billion dollars (App. 13a, par. 6). In 1965, these figures had doubled, and Ford ranked second and third in sales and assets among industrial corporations in this country (App. 441a).

Over the years Ford has been the second leading producer of automobiles. It has more than a fourth of the entire industry output. The combined production of it, General Motors and Chrysler constitutes more than 90 percent of that output (App. 444a).

A highly integrated manufacturer, Ford makes all or a substantial portion of many of its requirements. Prior to the acquisition, however, it did not make spark plugs or batteries.[2] It purchased these parts from independent companies—that is, companies not owned by an automobile manufacturer (App. 438a, 496a).

Ford sells automotive parts and accessories, including spark plugs and batteries, in the automobile repair and replacement market, often referred to as the "aftermarket." These items include those it manufactures itself, as well as those it purchases from independents. Independents, some of whom supply parts to automobile manufacturers for original installation as well as for the replacement market, also sell parts directly to the replacement market through other channels (App. 212a, 216a, 220a, 496a–497a). Prior to 1959, Ford's sales to the replacement market

[2] Ford had manufactured batteries for a brief period in the 1920's (App. 528a, n. 34).

were effected through its franchised dealers (App. 380a, 393a).

For a number of years, Ford actively investigated increasing its penetration of the replacement market. A study it made revealed a steady growth of that market, and indicated that sales amounted to about 3.5 billion dollars a year (App. 393a–394a). Ford's share of that market, however, had not kept pace with its share of the total car market; sales to the aftermarket through its franchised dealers had declined substantially (*ibid.*). This had resulted in large measure from the fact that car owners had shifted their tune-up and minor repair business from the franchised dealers to service staions, independent garages, and other retail outlets (App. 219a).

The franchised dealers were not an effective channel to this business, since the major source of supply for these outlets was independent warehouse distributors and jobbers (App. 344a). Moreover, unlike franchised dealers, these repair outlets were oriented to servicing all makes of cars, so that a car manufacturer that wanted to expand its share of the replacement market had to offer parts applicable to all makes of cars, not just its own models as Ford had been doing through its dealers (App. 219a–220a).

Beginning in 1959, Ford sought ways to increase its sales in the replacement market by utilizing the independent channels of distribution. Since distribution to the aftermarket through Ford's franchised dealers yielded it the greatest profit (App. 343a), Ford initially sought to use the independent distribu-

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tors without altering the arrangements with its dealers (App. 323a–324a). Thus, Ford decided to continue employing the "FoMoCo" name on its branded parts installed as original equipment and its branded replacement parts sold through dealers; a new brand, "Motorcraft," was established for replacement parts (mainly ignition and fuel system parts, App. 315a–320a) sold through independents (App. 323a–324a, 510a–512a).[3]

The "Motorcraft" program was not successful (App. 164a, 512a). An internal company study indicated that effective participation in the aftermarket required "an established distribution system with a recognized brand name, a full line of high volume service parts, engineering experience in replacement designs, low volume production facilities and experince, and the opportunity to capitalize on an established car population" (App. 379a). For Ford to meet those requirements on its own would involve "a long period of time" and "major investments;" the study suggested as a "most attractive alternative" that Ford "acquire an existing brand name, distribution system, and experienced production and engineering organization" through the acquisition of a company with established sales in the aftermarket (App. 381a).

At about this time, a special studies group was formed "to locate and to investigate potential investment

[3] The spark plugs that Ford used as original equipment and sold in the aftermarket did not carry either the "FoMoCo" or the "Motorcraft" brand, but instead the brand of its supplier, the Champion Spark Plug Company (see *infra*, pp. 9–10).

opportunities" in companies in the automotive parts manufacturing field (App. 472a).[4] Following an initial contact by Ford (App. 170a), two Ford officials met with representatives of Electric Autolite in June 1959, and visited various Electric Autolite facilities (App. 482a–489a). Electric Autolite then was one of the largest suppliers of automotive parts, with sales totalling about 220 million dollars (F–1F) and total assets of about 150 million dollars (App. 500a, n. 10). It was considering disposing of certain of its assets used in the manufacture and distribution of spark plugs and batteries,[5] and Ford personnel thought that it was "the most promising * * * candiate for acquisition by Ford" (App. 382a; see also App. 381a–391a).

In connection with its spark plug and battery operations, Electric Autolite had a nationally recognized brand name, "Autolite," and an established nationwide distribution organization. Thus, Electric Autolite's spark plug and battery business suited Ford's requirements for effective participation in the replacement market: (1) Autolite plugs and batteries were high-volume service parts which fit competitive cars as well as Ford makes; (2) they bore a nationally recognized brand name; and (3) the company had an established

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[4] Electric Autolite is sometimes referred to in certain of the group's reports under the code names "O'Leary Corporation" or "Mars" (App. 156a–157a).

[5] Electric Autolite then had its own reason for favoring a sale. Though it had the Chrysler account for spark plugs installed as original equipment, it feared losing that business as Chrysler moved toward manufacture of its own electrical equipment needs (App. 395a–396a, 550a–551a).

nationwide distribution organization oriented towards the aftermarket (App. 395a).

Moreover, the acquisition offered a greater likelihood of more profitable aftermarket participation than internal expansion. Though Ford had the resources to enter on its own and had developed projections for doing so (App. 289a–295a), that would have taken considerably more time and would have been more costly than an acquisition (App. 147a–148a, 152a–154a, 171a–173a). Start-up costs and increased prices for original equipment plugs (see *infra*, pp. 10–11) would have amounted to several million dollars, and a minimum of five to eight years would be required to develop and establish its own brand of plugs and distribution system (App. 558a–559a). Electric Autolite's spark plug assets were priced at a premium over book value (App. 168a–169a; F77), but the acquisition of the Autolite name and distribution organization would give Ford immediate access to an established replacement market (App. 172a–173a).

Ford therefore discontinued its studies of entering this field through internal expansion. Instead, by agreement dated April 12, 1961, it contracted with Electric Autolite to purchase the "Autolite" trademark and trade name, Electric Autolite's only spark plug plant in this country (located at Fostoria, Ohio), a battery plant at Owosso, Michigan (one of six owned by Electric Autolite), its distribution organization for spark plugs, batteries and electrical parts, and the

major portion of its spark plug engineering and manufacturing organization (App. 247a).[6]

The spark plug market, at the time of and for many years prior to the acquisition, was highly concentrated. Three producers accounted for more than 95 percent of all shipments (App. 550a; G–161). The General Motors Corporation had entered the spark plug manufacturing field as the result of an acquisition in 1909 (App. 546a–547a); it made the "AC" brand and had more than 30 percent of the market (G–161).

The two other major producers, Electric Autolite and the Champion Spark Plug Company ("Champion"), were independents. For about 20 years prior to the acquisition, Electric Autolite had been Chrysler's sole supplier. It had almost 15 percent of the spark plug market. Champion, which had been Ford's sole supplier for several decades before the acquisi-

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[6] Simultaneously, the parties executed a Purchase Parts Agreement providing, *inter alia*, that (1) Ford would purchase from Electric Autolite a total of 12 million spark plugs over a two year period; (2) Ford would supply Electric Autolite with ceramic insulators (a necessary component of a spark plug) but would not be required to supply more than would be necessary to produce 25 million spark plugs a year; and (3) Ford would purchase from Electric Autolite 45 percent of its total batteries requirements for a 3-year period ending with the 1964 model year (App. 278a–281a).

Though Ford initially considered a proposal to purchase substantially all the assets of Electric Autolite, it decided on the more limited acquisition and the Purchase Parts Agreement under which Electric Autolite could continue producing spark plugs and batteries, "primarily * * * to avoid action that might raise serious questions under the antitrust laws" (App. 396a, see also App. 170a–171a).

tion, had about 50 percent of industry sales (App. 547a, 550a). The remaining 3 to 4 percent was divided among several other producers supplying primarily the private-label replacement market (App. 549a–550a, and n. 51, 192a, 763a–765a).

Historically, there has been a strong tendency to replace spark plugs with the same brand installed in the automobile as original equipment—thus giving rise to the so-called original equipment, or "OE", tie. Mechanics dispense most replacement plugs, and usually replace a factory-installed set of plugs with a set of the same brand. The mechanics' fear that damage may follow from the failure to use the OE brand is reinforced by promotional literature emphasizing the use of "genuine" parts (App. 418a–422a, 755a, 53a, 681a). The OE tie, though definite (App. 548a; 232a, par. 44), is "more psychological than technically necessary" (App. 548a), since "all active brands do appear on a full line of cars of every variety, and normally function well in all cars" (App. 546a).[7]

Nevertheless, spark plug makers value highly the OE tie because of its historical importance to aftermarket sales. Thus, to retain Ford as a customer, and the aftermarket advantages that follow from this, Champion agreed in 1920 to supply Ford's OE

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[7] A Ford official pointed out that "the majority of race drivers and car owners * * * competing on the stock car circuit with Pontiacs [a GM product with originally-equipped AC plugs] prefer [the Ford-made] Autolite spark plugs * * * [and that] a number of Pontiac dealerships are now using Autolite plugs instead of AC" (App. 416a; see also App. 27a–28a).

requirements at cost—about six cents a plug. In 1960 Champion still charged Ford only six cents a plug, though its cost had roughly tripled. The two other leading producers (Electric Autolite and General Motors) adopted the same practice for original equipment customers (App. 547a, 230a–231a). Plug makers recover their losses on OE sales by profitable sales in the aftermarket, where the requirement of each vehicle during its lifetime for about five replacements of plug sets generates substantial demand and the OE tie directs that demand to OE-brand plugs (App. 549a; 222a, par. 23; 231a, par. 42).

Following the acquisition, the three leading producers of spark plugs still made more than 95 percent of total industry shipments (G–161). Two of them, however—General Motors and Ford—were also automobile manufacturers. Respectively, in 1964 they accounted for almost 40 and 16½ percent of spark plug shipments. The only independent remaining among the leading producers was Champion, whose market share declined from just under 50 percent in 1960 to just under 40 percent in 1964 (G–161) and to about 33 percent in 1966 (App. 468a). Although Champion obtained the Chrysler account after the acquisition its deteriorating market position was reflected by its "revolutionary concession" to Chrysler in which it agreed to furnish, starting in 1964, one-fourth of Chrysler's original installation (OE) requirements under Chrysler's own "MoPar" brand (App. 553a). Prior to that, Champion had always sold its OE plugs under its own name, thus obtaining for that name the sole benefit in the aftermarket of the OE tie.

After the acquisition Electric Autolite changed its name for the portions of its business that it had retained to Eltra Corporation, and in 1962 began manufacturing plugs in a plant in Decatur, Alabama under the brand name "Prestolite" (App. 238a–239a, par. 55.) But having been replaced as Chrysler's supplier by Champion, its share of shipments dropped to 1.2 percent (App. 552a). Several small private-label manufacturers continued to share the balance of the market (App. 549a–550a).

2. THE PROCEEDINGS BELOW

A. THE DECISION ON THE MERITS

After an extensive trial, the district court held that the acquisition violated Section 7 of the Clayton Act because its effect may be substantially to lessen competition in the production, sale, and distribution of spark plugs and batteries (App. 495a–571a).[8] Appellant does not contest the judgment with respect to batteries (Ford Br. 5).

The court found that the acquisition would have two principal adverse effects upon spark plug competition:

(1) It eliminated Ford both as a potential entrant into the spark plug market and as the largest purchaser of spark plugs, and the powerful competitive force that this dual role exerted on that market (App. 554a–556a, 563a). Champion was Ford's sole supplier prior to the acquisition, and considered its OE status with Ford essential to its position in the replacement market. To

[8] The district court dismissed that portion of the complaint which charged anticompetitive effects with respect to ignition parts and automobiles (App. 571a).

protect this status Champion made price concessions to Ford, not only on OE sales, but also on sales for redistribution in the replacement market, by reducing its profit margins on those sales. This in turn affected the entire aftermarket, since as a result of earlier litigation Champion had to charge other aftermarket distributors competing with Ford the same price it charged Ford for replacement plugs.[9] Because of Champion's strong position among independent aftermarket outlets, its aftermarket prices moderated the prices charged by competing spark plug manufacturers (App. 554a–555a).

"[A]s both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly," Ford's preacquisition position served "to check any avarice on the part of Champion" and to "mollify the evils of oligopoly" (App. 653a, 556a). The acquisition removed Ford as a "safety valve" and left "no similar counterbalance as to Ford, * * * regardless how extravagant its replacement [spark plug] price may become" (App. 556a).

(2) The acquisition also significantly foreclosed to independent manufacturers of spark plugs the substantial share of the market represented by Ford's requirements (App. 563a–566a). Through the acquisition Ford became completely integrated as to spark plugs, supplying all of its requirements for original-

[9] The spark plug producers' below-cost pricing practices for OE customers was sustained following litigation in the early 1950's. As a result of the litigation, however, Champion was required to offer replacement plugs to independent distributors at the same price it charged Ford. (App. 547a–548a, 555a.)

equipment installation and aftermarket sales. This reduced the total spark plug market available to independents by about 10 percent, the amount of Ford's prior purchases. This foreclosure of the market had special significance: Ford, the second largest of the "big three" automobile manufacturers, was a major OE customer, and General Motors, the largest automobile manufacturer and spark plug user already supplied its own needs. The additional foreclosure took away from existing producers, as well as from potential entrants. "the opportunity to try" to obtain the Ford account, thus destroying the "motivation which Ford, even though long a Champion customer, gave other plug makers to work a change which could lead to deconcentration" (App. 564a, 565a).

The court also referred to the more difficult post-acquisition position of Champion, the only remaining substantial independent. For decades Champion had supplied Ford with below-cost plugs for OE installation, but only under the "Champion" label so that it obtained all the aftermarket advantages from the OE tie. After the acquisition, Champion sold to Chrysler, now the only substantial car manufacturer not integrated as to plugs. To do so, however, it had to agree to furnish "one-quarter of Chrysler's assembly requirements under the latter's own 'MoPar' brand, but still at six cents each, and, in effect, to subsidize an attempt to gain a foothold for 'MoPar' with an eye toward eventually stripping 'Champion'

of the last vestiges of major new-automobile [OE] status" (App. 553a).

B. THE DECISION ON RELIEF

Following the parties' failure to negotiate an agreement as to relief, each submitted its own proposal and supporting briefs. Ford proposed (App. 771a–772a):

> that it be permitted to retain the facilities acquired from the Electric Autolite Company, together with the trade name "Autolite"; that Ford provide Eltra Corporation [the successor to Electric Autolite] with certain machinery to increase its production capacity; and that Ford purchase 30,000,000 spark plugs per year from Eltra for ten years. In this way Ford proposes to raise Eltra's spark-plug-making capacity to about 56,000,000 plugs per year from the present production of 17,000,000 and at the same time provide Eltra with an outlet for the sale of these additional spark plugs. Finally, Ford would be enjoined from acquiring any other spark plug * * * plant for ten years * * *.

The government proposed (App. 771a):

> complete divestiture of the assets acquired by Ford * * * [and] that Ford be prohibited from manufacturing spark plugs for ten years and * * * be required to purchase a declining percentage of its spark plug needs from the operator of the divested spark plug factory * * *, which spark plugs are to be labeled "Autolite."

After further extensive hearings, the court issued an opinion on July 7, 1970 (App. 770a) and a decree on December 18, 1970 (App. 785a).

The court rejected Ford's suggestion that it retain the spark plug plant and "Autolite" name. Nor did it wholly accept the government's proposal.[10] Noting the practical limitations on a trial judge in prescribing remedies and the need to avoid unnecessary injury, the court "proceeded most carefully and deliberately in determining what relief * * * [to] decree" (App. 772a). It pointed out its earlier determination that the acquisition eliminated Ford as a potential entrant and the "pervasive [moderating] impact" that this had on Champion and other plug makers in the aftermarket (App. 773a), and that it foreclosed Ford as a purchaser, thus raising the barriers to entry in the market (App. 773a–774a). It stated (App. 774a): "Ford's acquistion of the Autolite assets, particularly when viewed in the context of the original equipment (OE) tie and of GM's ownership of AC, has the result of transmitting the rigidity of the oligopolistic structure of the automobile industry to the spark plug industry, thus reducing the chances of future deconcentration of the spark plug market by forces at work within that market."

The relief, the court held, "must be designed to eradicate the tendencies of the acquisition to substantially lessen competition in the context of the present market and economic conditions" (*ibid.*). It concluded that "in view of the structural effects of this acquisi-

[10] As the court explained (App. 772a): "It is difficult to conceive of proposals for relief that are farther apart and that share less common ground."

tion * * * the only remedy that will effectively correct the situation is that of divestiture," since "[i]n no other way can the foreclosure of Ford" and the elimination "of Ford's pre–1961 impact on the actions of Champion and the other major manufacturers" be overcome (App. 778a).

The court took into account "that forces are now at work within the spark plug market that may well lead to its eventual deconcentration by increasing the number of potential customers for a new entrant into the plug manufacturing business and reducing the need for original equipment identification" (App. 780a). Mass merchandisers are beginning to enter the field, selling all makes of plugs as well as promoting their own private brands. One oil company—Standard Oil—already sells private labels and others are expected to do so. Ford's continued ownership of Electric Autolite's spark plug assets, the court concluded, "restrained [these forces] more than they would otherwise be." This is due in large measure to the fact that "[i]t is in the self-interest of the OE plug manufacturers [such as Ford, after the acquisition] to discourage private brand sales and to strengthen the OE ties." Thus, "[t]o the extent that the spark [plug] manufacturers are not owned by the auto makers, it seems clear that they will be more favorably disposed toward private brand sales and will compete more vigorously for such sales" (App. 780a).

Finally, the court concluded that "certain injunctive provisions are required in order that divestiture may be made effective and to give * * * [the divested

plant] an opportunity to establish its competitive position" (App. 780a). Accordingly, the decree (App. 781a–782a, 787a–788a).

(1) enjoined Ford for ten years from manufacturing spark plugs,

(2) ordered Ford for five years to purchase one half of its total annual requirement of spark plugs from the divested plant under the "Autolite" name, and

(3) prohibited Ford for the same period from using its own tradenames on plugs.[11]

SUMMARY OF ARGUMENT

I

The district court correctly held that the effect of Ford's acquisition of the spark plug assets and trade name of Electric Autolite may be substantially to lessen competition, in violation of Section 7 of the Clayton Act. Prior to the acquisition, General Motors manufactured its own spark plugs; it and the two independent producers, Champion and Electric Autolite, accounted for more than 95 percent of all spark plug shipments. Ford, the largest purchaser of spark

[11] The decree also included provisions dealing with Ford's distribution policies in the replacement market to assure that "Autolite's present distribution can be preserved to the [divested plant] * * * for an interim period" (App. 782a; see *id.* at 788a), and provisions designed to protect the employees of the Fostoria plant by ordering Ford to condition its divestiture sale on the purchaser assuming the existing collective bargaining contract, and to offer employment to any employee displaced by a transfer of non-plug operations from the divested plant (App. 782a, 788a–789a).

plugs from an independent producer, purchased 10 percent of total industry output (more than 38 million plugs annually, costing about $10 million), which it bought from a single supplier, Champion, under the Champion brand. Because of the practice of using the same brand of plugs as replacements as the original equipment plug (a practice known as the "OE tie"), it is extremely difficult for an independent manufacturer to sell in the replacement market unless he has substantial OE sales. The replacement market is the source of profit for spark plug manufacturers, since for many years OE plugs have been sold to automobile manufacturers at a substantial loss.

A. The effect of Ford's acquisition of Electric Autolite was to foreclose to competing sellers of spark plugs the substantial segment of the market that Ford previously had purchased from Champion. At the time of the acquisition, General Motors manufactured its own plugs and thus supplied about 50 percent of the total OE market. Since Ford previously had purchased approximately 30 percent of the total OE plugs sold by independent manufacturers, the acquisition foreclosed 60 percent of the remaining OE market available to independent manufacturers. Because of the importance of the OE tie, the anticompetitive effect of this foreclosure also will be felt by independents in the replacement market. The foreclosure of so substantial a segment of the market violated Section 7. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323–324.

The record does not support Ford's claim that the foreclosure merely eliminated a "purely theoretical"

opportunity for an independent producer to get its spark plug business. Before the acquisition, Ford's supplier, Champion, had only a year-to-year contract with Ford, and other independents in fact sought the Ford account. It was only as a result of the "more permanent and irreversible tie" (*Brown Shoe Co., supra,* 370 U.S. at 332, n. 55) arising from the acquisition that the Ford market finally was foreclosed.

B. The acquisition also eliminated the pro-competitive effects that Ford had on the spark plug industry, through its pre-acquisition position on the market's edge as the leading customer from independent manufacturers. "The existence of an aggressive, well equipped and well financed corporation * * * waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 174. Ford, because of its interest in seeing that its spark plug needs were met on the best possible basis and its obvious ability to undertake direct spark plug production, was a likely candidate to begin manufacture of spark plugs if the independent manufacturers failed to satisfy its demand. It therefore exerted a strong moderating influence on existing plug manufacturers and was a significant incentive to competition. The record shows that Ford's position on the edge of the market provided a substantial impetus to competition.

C. The alleged benefits to competition resulting from the acquisition do not justify it. The shift in the market shares among the three leading firms in

the industry following the acquisition did not result from more vigorous competition by Electric Autolite in the hands of Ford than had existed when it was an independent. It resulted from the fact that Champion lost the Ford business and replaced it with the smaller Chrysler account, and that Electric Autolite substituted the larger Ford business for the Chrylser business it previously had.

II

The relief the district court ordered was proper.

A. Divestiture of the Electric Autolite plant and trade name is necessary to restore the market structure to its position before the acquisition. Divestiture reestablishes the pre-merger market structure, where Ford was the leading purchaser of plugs from independent sources. With the aid of the various injunctive provisions of the decree, the divested plant should be able to regain the important competitive role it had in the market before the acquisition.

B. The injunctive provisions, which run for either five or ten years, are necessary to make the divestiture effective. Ford obtained important competitive advantages through the acquisition, which it has had the benefit of for ten years. These advantages must be neutralized if the divested plant is to have an prospect of reestablishing itself as a viable spark plug producer and of regaining a fair share of the market. The district court did not abuse its discretion here in imposing temporary restraints reasonably designed to do just this.

The ten-year prohibition against Ford manufacturing plugs restores Ford to the "customer" status it had prior to the acquisition, and is designed to let the divested plant regain its preacquisition market position.

The five-year bar against Ford using plugs bearing a Ford trade name will enable the divested plant to redevelop an OE position, thus restoring the market's preacquisition competitive structure. The divested plant should have ample demand for its product, whether or not Ford continues to sell plugs to the replacement market.

The five-year requirement that Ford purchase half its needs from the divested plant under the Autolite brand assures that the divested plant will again have a substantial customer. Ford's interests are adequately protected by providing that the plugs it must buy conform to its standards and be competitively priced.

ARGUMENT

I. THE EFFECT OF THE ACQUISITION MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN THE SPARK PLUG BUSINESS

The district court correctly held that the acquisition by Ford, the second largest automobile manufacturer, of the assets of Electric Autolite, the second largest independent producer of spark plugs, violated Section 7 of the Clayton Act, because its likely effect is substantially to lessen competition in the pertinent line of commerce, the manufacture and sale of spark plugs.

The spark plug market is now, as it was at the time of the acquisition, characterized by an "oligopolistic structure" (App. 554a). There is a high degree of concentration, with three firms accounting for about 95 percent of total output. The prices of these firms do not vary significantly (App. 760a, 761a, 778a), reflecting the "dearth of competition" (App. 547a) in the industry. There are high barriers to entry into the market on any significant scale, principally because of the importance of the OE tie to sales in the more profitable and important replacement market, and the difficulties of selling in the OE market.[12] In this setting, the district court correctly found that Ford's acquisition of Electric Autolite's spark plug assets altered the market structure by eliminating the moderating effect upon spark plug sellers that Ford's presence on the edge of the market previously had had, and by raising even higher the barriers to entry by foreclosing the significant portion of the market previously represented by Ford's purchases.

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[12] The OE tie, the court below explained, was a "vital prerequisite for a newcomer" to obtain a significant share of the replacement market (App. 549, 554a, 589a), and its absence made survival in the field extremely precarious. The examples the court gave are instructive (App. 549a):

> Few except Electric Autolite ventured into the field after Champion and General Motors divided it. Of those which did, none ever surpassed the 2% level. Several have come and gone. Firestone Tire and Rubber Company merchandised "Firestone" replacements for 35 years before it gave up in 1964. Although it owned some 800 accessory stores and successfully wholesaled other items to more than 50,000 shops and filling stations, it could not surmount the patent discrimination against brands not blessed with Detroit's approbation. Goodyear Tire and Rubber Company quit in only three years. Globe Union, a

Moreover, the substitution of a company with the resources and financial strength of Ford for Electric Autolite is likely to diminish the incentive of other independent manufacturers to compete for the remaining available small share of the spark plug market. See *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 578–579; *General Foods Corp.* v. *Federal Trade Commission*, 386 F. 2d 936, 946 (C.A. 3), certiorari denied, 391 U.S. 919; *Reynolds Metals Company* v. *Federal Trade Commission*, 309 F. 2d 223, 229–230 (C.A. D.C.). Finally, as the district court recognized in its opinion on relief (App. 780a), independent spark plug manufacturers "will be more favorably disposed [than manufacturers owned by automobile companies] toward private brand sales and will compete more vigorously for such sales" at lower prices than those charged for plugs bearing the OE label.[13]

A. THE ACQUISITION SIGNIFICANTLY FORECLOSED TO INDEPENDENT MANUFACTURERS OF SPARK PLUGS THE SUBSTANTIAL SHARE OF THE MARKET REPRESENTED BY FORD'S REQUIREMENTS

As a result of the acquisition, Ford had an in-house source for its spark plug needs, and the sub-

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fabricator which had barely 1% of the nation's shipments, withdrew in 1960. Apart from those with substantial new-car association, the most noteworthy emblem in the aftermarket in 1966 was "Atlas," sponsored by the Standard Oil companies, with 1.4% of all service elements. "Prestolite" and Sears, Roebuck's "Allstate," 0.2 points off this pace, were next, followed by Montgomery Ward's "Riverside" with 0.6%. Several dozen others, belonging chiefly to hardware and cut-rate chains and farm-implement firms, attained a combined total of 2.4%. * * *

[13] OE plugs are about 50 percent higher in price than private brands, 40 cents as against 26 to 28 cents each (App. 780a, n. 3).

stantial share of the spark plug market, both OE and replacement, that Champion previously had supplied was foreclosed to the independent plug manufacturers. The anticompetitive effects of such foreclosure were explained in *Brown Shoe Co.* v. *United States, supra,* 370 U.S. 294, 323–324:[14]

> The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition" * * * which "deprive[s] * * * rivals of a fair opportunity to compete." * * * Every extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement. * * * [Citations and footnotes omitted.]

The court below held that the foreclosure of the Ford market "seems to be a blatant Clayton Act violation according to the teaching of *Brown Shoe Co.* v. *United States, supra,* in particular when seen against the background of the exclusion at General

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[14] See, also, *United States* v. *du Pont*, 353 U.S. 586; *United States Steel Corp.* v. *Federal Trade Commission*, 426 F.2d 592, 598–605 (C.A. 6); *United States* v. *Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D. Calif.); *United States* v. *Standard Oil Co.* (N.J.), 253 F. Supp. 196, 224–227 (D. N.J.); *United States* v. *Aluminum Co. of America*, 233 F. Supp. 718 (E.D. Mo.), 247 F. Supp. 308 (E.D. Mo.), affirmed *per curiam*, 382 U.S. 12; *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, 102–105 (S.D.N.Y.), affirmed *per curiam*, 381 U.S. 414.

Motors * * *" (App. 563a–564a). Prior to the acquisition, Ford had purchased almost 10 percent of total industry output. Even that substantial share of the market, involving sales of approximately 10 million dollars,[15] however, does not reflect the full extent of the anticompetitive effect of the foreclosure.

Before the acquisition, General Motors, the manufacturer of about 50 percent of all automobiles, supplied internally all of its own original equipment spark plugs, so that only 50 percent of the important OE market was open to independent plug producers. Ford's share of the automobile market is approximately 30 percent, and the acquisition removed this additional source of original equipment spark plug business. The practical effect of the acquisition, therefore, was to foreclose approximately 60 percent of the OE market actually available to independent producers, who now have only about 20 percent of that total market available to them.

This foreclosure also has effects in the aftermarket. The OE tie, reinforced by the promotional literature of the automobile manufacturers, still has a substantial impact on that market, and becoming an OE supplier is of continuing importance for replacement sales. As a result of the acquisition, the independents are foreclosed from the Ford OE business and their

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[15] In 1960, the last full year prior to the acquisition, Ford purchased 38,675,000 spark plugs for approximately 10 million dollars. It purchased 16,141,000 units for original equipment and 22,534,000 for the aftermarket (App. 428a), for which it paid approximately 6 and 39 cents, respectively, per unit (App. 377a, 761a; G 15, p. 17).

exclusion from that important market will injure them competitively in the replacement market.

At the same time, the acquisition strengthens the OE tie prevalent in the industry. Ford now has its own brand of plugs for sale in the lucrative replacement market, and thus has every reason to take steps to improve its brand's acceptance and penetration in that market. The OE tie, of course, traditionally has been the means of doing this. Mechanics and other aftermarket purchasers have been encouraged, with substantial success, to buy only OE brands for replacement purposes, and the result has been that independent manufacturers with only private labels and no OE relationship have had great difficulty in penetrating the aftermarket.

Since the result of the acquisition is that the OE tie benefits Ford and its brand directly, Ford will seek to maintain and strengthen the OE tie to the detriment of the private label trade. As the court below explained: "It is in the self-interest of the OE plug manufacturers to discourage private brand sales and to strengthen the OE tie. To the extent that the spark [plug] manufacturers are not owned by the auto makers, it seems clear that they will be more favorably disposed toward private brand sales and will compete more vigorously for such sales" (App. 780a, footnote omitted). While the acquisition thus strengthened the OE tie, the foreclosure of the Ford OE market for the independents that it created concomitantly weakened their ability to penetrate the aftermarket. Thus, the effect of the acquisition is to raise substan-

tially the serious barrier which the OE tie poses for entry into the market.

The foreclosure of competing spark plug manufacturers from so substantial a segment of the market and the accompanying significant increase in the barriers to entry into the market violated Section 7. See *United States* v. *du Pont & Co.*, 353 U.S. 586, 595. Cf. *Standard Oil Co.* v. *United States*, 337 U.S. 293, 314.

Ford contends (Br. 28), however, that the other manufacturers' "opportunity to try" to get Ford's business was "purely theoretical," since Ford's business was already foreclosed because Champion, a long-standing supplier, was in no danger of losing the Ford account and no other company could offer Ford satisfactory terms. But Champion had no assurance that it would continue to have Ford's business. Champion's vice-president testified that it was "concerned" about competition from other producers because it had just a year-to-year contract (App. 24a, 35a).[16] Indeed, he was aware that before the acquisi-

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[16] Champion's vice-president explained the contractual relation with Ford on direct examination by government counsel (App. 24a):

> Q. Now, could you tell me what were your contractual relations with the Ford Motor Company in supplying these plugs? A. Well, it was actually a contract that recreated itself every year. We had to negotiate a separate contract each year. * * *
>
> Q. Were you ever aware, or were you ever informed by Ford officials that any other spark plug manufacturer was attempting to acquire this business? A. Yes, sir. There were numerous occasions, oh, a few years preceding 1961, where we knew that Electric Autolite Company was

tion Electric Autolite "was very seriously trying to obtain the Ford business" (App. 24a, 35a). General Battery and Ceramic also tried to get that business (App. 186a–187a). Ford even approached the Bosch Corporation of Germany and indicated an interest in its ability to supply spark plugs (App. 197a, 564a).[17]

As long as Ford's arrangements were only contractual, the "opportunity [of others] to try" for Ford's business was hardly "theoretical." It was only as a result of the "more permanent and irreversible tie" arising from the acquisition that the Ford market finally was foreclosed. *Brown Shoe Co. v. United States, supra,* 370 U.S. at 332, n. 55. The result, as the district court noted, is "the destruction of the motivation which Ford, even though long a Champion customer, gave other plug makers to work a change which could lead to deconcentration" (App. 565a).

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very seriously trying to obtain the Ford business, the Ford spark plug business.

On cross-examination, the colloquy between Ford counsel and the vice-president was as follows (App. 35a):

> Q. Well, I take it, then, that you were not concerned until you learned of the acquisition that Ford Motor Company would integrate manufacture and push you out? A. We were concerned about Autolite getting in there, because there was no actual affiliation, no financial arrangements between Ford and Champion, and we had to sell them a quality product and service them well to retain that business. And if Autolite had been able to persuade them that they could have done as well or better, our account would be in jeopardy. * * *

[17] Though Ford states that the prices offered by these suppliers "was far too high to justify Ford's serious consideration" (Ford Br. 28, n. 16), the president of Bosch's American subsidiary testified that Bosch would have been willing to supply OE plugs to Ford under the Bosch brand at the 6-cent industry price (App. 204a).

Moreover, that possibility of selling to Ford, which the acquisition eliminated, was "one of the few very discernible ways in which such a change [in the rigidity of the spark plug market structure] could be brought about" (*ibid.*).

B. THE ACQUISITION ELIMINATED FORD'S PRO-COMPETITIVE INFLUENCE ON THE SPARK PLUG MARKET, AS A POTENTIAL ENTRANT AND AS THE LARGEST PURCHASER.

1. In an oligopolistic market like the spark plug industry, the threat of entry into the market—potential competition, in other words—restrains those already in the market from exploiting fully their market power. If oligopolists overprice their products or engage in other anticompetitive activities, they run the risk that other companies on the edge of the market may thereby be stimulated to enter it. Potential competition thus to some extent works as a substitute for the vigorous competition ordinarily absent in oligopolistic markets. As this Court recently stated, "[t]he existence of an aggressive, well equipped and well financed corporation * * * waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174.[18]

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[18] See also, *e.g.*, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–581; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 173–174; *United States* v. *Continental Can Co.*, 378 U.S. 441, 458, 464, 465–466; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651; *Ekco Products Co.* v. *Federal Trade Commission*, 347 F. 2d 745 (C.A. 7);

For this reason, an acquisition which removes from a market a firm whose presence on the edge thereof has been a significant incentive to competition may substantially lessen competition, in violation of Section 7. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–581; *United States* v. *Penn-Olin Chemical Co., supra; United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 658–661.

Ford's relationship to the spark plug market prior to the acquisition shows that its presence on the edge of that market was a significant incentive to competition. Ford, as the second largest automobile manufacturer and the largest purchaser of spark plugs, had a strong interest in insuring that its spark plug requirements were filled on the best possible basis. If plug manufacturers attempted to take too great advantage of the market situation to Ford's displeasure, there always was the threat that Ford would begin to manufacture plugs to supply the needs of both its own automobiles and its aftermarket sales. This threat of entry was all the more substantial because of Ford's immense financial resources, as a multi-billion dollar corporation, and obvious ability to undertake direct spark plug production. Ford therefore was, as the district court concluded (App. 563a), the "prime candidate to manufacture," and exerted a moderating influence on existing plug manufacturers.

United States v. *Wilson Sporting Goods*, 288 F. Supp. 543 (N.D. Ill.); *United States* v. *Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Calif.), affirmed *per curiam*, 385 U.S. 37; *United States* v. *Standard Oil Co.*, 253 F. Supp. 196 (D. N.J.).

The procompetitive influence that Ford had on the spark plug market was further increased by the fact that it also was the major customer of Champion, "the dominant member of the oligopoly" (App. 563a). Champion had to satisfy Ford's demands, not only to deter Ford from entering the spark plug manufacturing business, but also to retain Ford's business. The competitive restraints that these pressures imposed upon Champion to satisfy its largest customer affected the entire aftermarket as well.

Champion supplied Ford with both OE and replacement plugs. Champion was under a Federal Trade Commission prohibition against charging Ford's competitor's in the aftermarket higher prices than it charged Ford for replacement plugs (see n. 9, *supra*). Thus, Ford's moderating influence upon Champion's pricing practices in selling replacement plugs to Ford necessarily led to similarly lower prices in Champion's sales to other aftermarket distributors. Champion's policies also undoubtedly influenced other spark plug manufacturers, since it then controlled half the total plug output and was the dominant market member.

Ford's presence on the edge of the market thus had, as the district court stated, the additional effect of "moderat[ing] all of Champion's replacement-sales policies directly and, given the oligopolistic structure in which Champion was the keystone, * * * touch[ing] those of the others [spark plug producers] indirectly" (App. 554a).

2. Ford does not challenge either the foregoing legal principles or the adequacy of the findings to support the conclusion of violation. Instead it asserts "that there is not a shred of evidence" to support the finding that before the acquisition Ford's position as a potential competitor "had a moderating effect on replacement prices" (Br. 23). The record refutes this contention.

a. As Champion's largest customer, Ford's economic power was apparent to Champion and influenced the latter's behavior. Champion, which manufactures only spark plugs, recognized the vital importance of retaining the Ford account (App. 30a, 35a). Champion's vice-president testified that it was "concerned" about losing Ford's business to a competitor, because "there was no actual affiliation, no financial arrangements between Ford and Champion, and we had to sell them a quality product and service them well to retain that business" (App. 35a). Over the years he had heard "whisperings here and there" that Ford might become a spark plug manufacturer, but believed that Champion could dissuade it from doing so by giving it "a quality product" "at a price that was satisfactory to them" (App. 36a). He admitted that although Champion had a policy against supplying private-label spark plugs, it would have considered doing so for Ford "because of the size of the Ford account" (App. 39a).

Nor were Ford officials unaware of the influence Ford had over Champion's policies. One of Ford's senior officers testified that Champion would have

attempted to dissuade Ford from manufacturing spark plugs by "deal[ing] with the price and terms of their replacement spark plug" (App. 154a).[19] As the court below concluded (App. 555a), Ford's "potential [entry into the market] plainly had a bearing on what it paid" for replacement plugs.[20]

b. There is no requirement that to prove a violation of Section 7 resulting from the removal of a potential competitor from the market the government also must show specific instances in which the acquiring firm di-

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[19] Ford's counsel acknowledged in opening and closing argument that Champion would probably have responded to a Ford threat to manufacture spark plugs by offering Ford a more competitive proposition than it was then getting. In that circumstance, Champion would "have had a very strong incentive to come to Ford and offer it economic incentives that were unrejectable" (App. 18a). "They could have reduced their price drastically to Ford for both original equipment and replacement spark plugs * * *" (App. 210a).

[20] The significant competive impact that the major automobile manufacturers have on their suppliers (like Champion) is widely recognized. The stipulated facts include the following (App. 213a–214a):

> The sales volume of parts and components suppliers for factory installation is subject to wide fluctation in volume as a result of the ability of automobile manufacturers to shift from outside purchase to internal manufacture and vice versa, and to shift from one supplier to another, and because of the sensitivity of these manufacturers to cost savings and quality control. The factory installation sales and a part of the replacement sales, of particular suppliers could be and have been eliminated or reduced by decisions on the part of the automobile manufacturer to produce rather than buy or to shift from one supplier to another. Some suppliers, who have relied heavily on factory installation sales to a particular automobile manufacturer have suffered extensively from having orders from such automobile manufacturer for such parts or components reduced or withdrawn.

rectly influenced the prices of others. Section 7 is concerned with "probabilities, not certainties," *Brown Shoe Co.* v. *United States, supra*, 370 U.S. at 323, and "[t]he requirements [of Section 7] * * * are satisfied when * * * the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown." *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 171. This standard does not provide "a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future * * *." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 362. Such a prediction is sound "only if it is based upon a firm understanding of the structure of the relevant market" (*ibid.*).

There is no dispute concerning the structure of the spark plug market prior to the acquisition. It was oligopolistic, with three producers controlling more than 95 percent of the output. Electric Autolite was the second largest independent producer and Ford, the largest customer of the independent producers, purchased all its plugs from the industry leader, Champion. In this market setting, the district court recognized the economic realities when it concluded that Ford's position on the market's edge was a moderating influence on existing market members. For, as this Court has indicated, in highly concentrated markets like this the existing members tend to moderate their prices and anticompetitive conduct where there is a potential entrant on the market's

edge, since their interests generally are best served by maintaining the existing oligopoly and the limited amount of competition that this ordinarily assures. *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 286; *United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 363.[21] This is particularly so where, as here, the potential entrant is a large customer of the industry's product and possesses immense resources that would enable it aggressively to enter the market if it chose to do so.[22]

3. Ford's specific challenges to the court's findings are unpersuasive. It argues that at the time of the acquisition it was not on the point of entering into the manufacture of spark plugs, and in fact had many reasons not to do so, so that it was not a likely entrant into the field (Ford Br. 23–24). But the important facts are that Ford was there as a *potential* entrant, and that its mere presence had a moderating influence on the plug manufacturers. That effect existed without regard to whether Ford had decided not to enter

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[21] See generally, Bain, *Industrial Organization* (2d ed. 1968), pp. 117 *et seq.*; Scherer, *Industrial Market Structure and Economic Performance* (1970), pp. 135–136.

[22] See generally, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; *United States* v. *Von's Grocery Co.*, 384 U.S. 270; *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592; *United States* v. *Continental Can Co.*, 378 U.S. 441; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158; *United States* v. *Aluminum Co. of America*, 377 U.S. 271; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651; *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

the market. Champion knew that Ford might enter and, as Ford itself points out (Ford Br. 24), hoped to keep the Ford account through competitive actions, by giving Ford "a price that was satisfactory to them" and "a quality product." While Champion may not have regarded Ford's entry as imminent, as Ford urges (*ibid.*), this reflected Champion's belief that it could keep the Ford business by satisfying Ford's standards; it was well aware that, if it did not do so, Ford might then have incentive to enter the market.

Thus, it was Ford's continuing presence "at the edge of the market" that had a substantial influence on the competitive behavior of the existing producers. See *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 173. It was on this ground that the court properly based its finding of illegality (App. 563a);

> An interested firm on the outside has a two-fold significance. It may someday go in and set the stage for noticeable deconcentration. While it merely stays near the edge, it is a deterrent to current competitors. *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964). This was Ford uniquely, as both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly. * * *

Ford further asserts that its presence did not moderate the replacement plug prices, since even if it had threatened to enter the market, Champion's probable response would have been to lower the price of the OE, rather than of the replacement, plugs it sold to Ford (Ford Br. 24–25). It also argues that "the below-cost 6-cent OE price necessitated recoupment of OE losses through replacement sales and thus had an inflating effect on replacement prices" (*id.* at 25).

But whether Champion's response to a Ford threat to manufacture plugs would have been to reduce the price of OE rather than replacement products is immaterial; the critical consideration is that Ford's mere presence as a potential manufacturer itself had an important pro-competitive affect in the industry. Moreover, it is unlikely that Ford, with its tremendous "bargaining leverage" (App. 555a), would have settled for a reduction in the OE price. Ford's chief concern was with expanding its sales in the lucrative replacement market, for which it already bought more plugs than for OE installation and where demand was increasing [22] (App. 243a). There was, moreover, a much smaller range within which to bargain about the 6-cent OE price, already only one-third of actual cost, than the substantially greater replacement plug price, and Champion undoubtedly would have stubbornly resisted a reduction in the OE price, which all OE suppliers had maintained at the same level since 1920 (App. 547a).

C. THE ALLEGED BENEFITS TO COMPETITION DO NOT JUSTIFY THE ACQUISITION

Ford seeks to justify the acquisition (Br. 20–22, 25–27, 33–36) on the ground that it aided, rather than

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[22] Ford's sale of replacement plugs through its franchised dealers was highly profitable. Between 1955 and 1960 its gross annual profits thereon averaged about $3.5 million (App. 232a). Following the merger Ford expanded extensively into the replacement market. While in 1960 it purchased 6 million more replacement plugs than OE plugs (App. 243a), three years after the acquisition Ford distributed about 40 million more plugs through the replacement market than it was installing as original equipment (App. 242a).

injured, competition. The argument apparently is that, under the ownership of Ford, Electric Autolite was a more vigorous and effective competitor against the two other major firms in the industry, Champion and General Motors, than Electric Autolite had been as an independent manufacturer. In support of this claim, Ford points out that the total market share of the two other manufacturers dropped from 83 percent of the replacement market in the year before the acquisition (1960) to 75 percent in 1969. As we discuss *infra*, pp. 46–47, however, this change resulted not from any new competitive vigor by Electric Autolite, but from the fact that as a result of the acquisition Champion lost Ford, its largest customer, and acquired the smaller volume of business of Chrysler, which manufactures only about half as many automobiles and trucks as Ford (App. 444a–450a).

Moreover, Ford's emphasis on this shifting of market shares as an indicia of pro-competitive effect is misplaced. In determining the effect of an acquisition upon competition, the important factor is the changes the acquisition produce on the overall market structure. See *Federal Trade Commission* v. *Procter & Gamble Co., supra,* 386 U.S. at 592 (Mr. Justice Harlan, concurring); *United States* v. *Continental Can Co.,* 378 U.S. 441, 458. The acquisition did not produce any pro-competitive effects in the structure of the spark plug market. Although Ford has now replaced Electric Autolite as one of the spark plug industry's big three, their combined market share is still more than 90 percent of the total output. The oligopolistic structure of the market has not been altered.

Ford also contends (Br. 21) that because of the acquisition there is now "[f]or the first time in the history of the industry * * * a fourth significant spark plug manufacturer, ELTRA." But Eltra has no OE affiliation, and the only OE account now available to independents, Chrysler, is held by Champion, the industry's largest producer, and "the difficulty in dislodging Champion [as Chrysler's supplier] is monumental" (App. 553a). Without an OE tie—still essential to penetration of the replacement market (see Br. 35, n. 21)—Eltra cannot be a "significant" manufacturer. As the district court concluded (App. 556a):

> Lacking important new-car affiliation, Eltra looks at birth like a pygmy whose growth will be stunted by deficiencies for which no amount of exertions can compensate.[24]

Finally, Ford argues (Br. 22) that because Champion, the industry's leader, has lost the Ford business and has been forced to accept the smaller Chrysler account, this will give Champion "the incentive and need to compete more vigorously in the sale of both Champion and private brand replacement plugs." But whatever impetus to more vigorous competition this situation may provide for Champion, that consideration would not be sufficient to justify the acquisition under Section 7 in light of the anticompetitive effects previously discussed.

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[24] Moreover, much of Eltra's share of the spark plug market resulted from its acquisition of the spark plug assets of General Battery and Ceramic Corporation in 1968 (App. 703a-704a).

What this Court said in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371, in rejecting a similar argument that alleged beneficial effects of a merger saved it from illegality under Section 7, is equally pertinent here:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

See, also, *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576, 617 (S.D.N.Y.). To justify this merger on the ground that Electric Autolite in the hands of Ford will compete more vigorously against the two other leaders of the industry than it had done as an independent would, as the district court pointed out (App. 774a), have the highly undesirable consequence of "transmitting the rigidity of the oligopolistic structure of the automobile industry to the spark plug industry, thus reducing the chances of futrue deconcentration of the spark

plug market by forces at work within that market." The acquisition cannot be justified by its alleged pro-competitive effects.

II. THE RELIEF THE DISTRICT COURT ORDERED IS PROPER

The purpose of relief in an antitrust case is "so far as practicable, [to] cure the ill effects of the illegal conduct and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88)—to "pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Co.* v. *United States*, 332 U.S. 392, 401). The relief must be "effective to redress the violations, whatever the * * * effect of such a decree on private interests"; the measures must be "effective to restore competition" (*United States* v. *du Pont & Co.*, 366 U.S. 316, 326).

In framing decrees in antitrust cases the district courts "are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States*, 332 U.S. 392, 400–401." *United States* v. *du Pont & Co.*, 353 U.S. 586, 607–608. See, also, *United States* v. *du Pont & Co., supra*, 366 U.S. at 322. Particular deference must be given to that discretion where, as here, the district judge who devised the relief was the one who also found the violation. See *United States* v. *du Pont & Co., supra*, 366 U.S. at 322, n. 3; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185.

In this case the district judge, who presided at the lengthy trial on the merits, conducted an eight-day

hearing on relief at which all facets of the problem were explored. The parties could not agree on this issue, and submitted sharply conflicting proposals (App. 771a–772a). The judge accepted neither proposal Instead, he fashioned a remedy designed essentially to restore, as far as possible, the market structure and competitive situation that existed before the acquisition.

The decree orders Ford to divest certain of the acquired assets (the manufacturing facilities and the trade name). In order to make the "divesture * * * effective and to give New Fostoria [the divested plant] an opportunity to establish its competitive position," the decree (1) enjoins Ford for ten years from manufacturing spark plugs, (2) enjoins it for five years from using or marketing plugs bearing a Ford-owned trade name or trademark, and (3) requires it for five years to purchase one-half its annual requirements from the divested plant under the "Autolite" name (App. 780a–781a, 787a–788a). Each of these provisions was reasonably designed to restore the competitive situation that existed before the merger, and each was an appropriate exercise of the district court's discretion.

A. THE DISTRICT COURT CORRECTLY ORDERED DIVESTITURE

"Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy

when § 7 of the Clayton Act * * * is involved" (*du Pont, supra,* 366 U.S. at 329–330), "[C]omplete divestiture is peculiarly appropriate in cases of [asset or] stock acquisitions which violate § 7" (*id.* at 328). See, also, *United States* v. *Crescent Amusement Co., supra,* 323 U.S. at 189; *Schine Chain Theatres* v. *United States,* 334 U.S. 110, 127–129; *United States* v. *Grinnell Corp.,* 384 U.S. 563, 578, 580.

Before the acquisition, General Motors was the only major automobile producer who manufactured its own spark plugs. Ford purchased all its requirements from the leading independent producer, Champion, under the latter's label. As discussed in Point I above, Ford, as the largest purchaser of plugs from independent sources, asserted strong competitive pressures both on Champion and on other producers who were potential sellers to Ford.

Divestiture of the Electric Autolite spark plug producing facilities and name restores, as far as practicable, the premerger situation. Ford once again will stand as a large industry customer at the edge of the market with a renewed interest in securing the best possible terms for its substantial plug purchases. Since Ford will again be a purchaser, the competitive pressures that existed among other spark plug producers to sell to Ford will be recreated. The divestiture also will eliminate the anticompetitive consequences flowing from the second largest automobile manufacturer's entry through acquisition into the spark plug manufacturing business.

The divested plant should quickly develop into the effective competitive force in the industry that it was prior to the acquisition. It will have a strong incentive to provide Ford with the best possible terms, not only in the hope of selling to Ford more than the 50 percent of the latter's requirements that Ford is required to purchase from it during the first five years of independent operation but also in the hope of retaining Ford's business thereafter. The other producers similarly will have an incentive to compete vigorously with the divested plant for Ford's business—again both for the 50 percent not preempted by the divested plant for the first five years and for all of Ford's business thereafter.

The divested plant will be assured of a foothold in the lucrative aftermarket, based on the wide acceptance of the "Autolite" name and, for at least the first five years, its assured sales to Ford of one-half of the latter's requirements. The divested plant will be aware that, if it does not retain any Ford business after the initial five-year period, its survival may depend largely on its ability to compete without an OE tie in the rapidly expanding aftermarket.[25]

It will thus have a strong incentive to compete aggressively for aftermarket sales on the basis of price, a factor which plays almost no role in the present sales activities of existing producers in that market (App. 778a).

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[25] In 1960 less than 340 million plugs were sold in the aftermarket (App. 234a); by 1980 aftermarket sales of 850 million plugs are anticipated (App. 767a).

Ford's challenge to the divestiture provision basically is but another formulation of its argument on the merits. It contends (Br. 30–31, 35) that since it has been "the only company that has been able to gain ground against the two industry giants," competition in the spark plug market would be better served if it retained the position it acquired in that market as a result of the acquisition.[26] We have previously discussed Ford's contention that the merger was legal because it is pro-competitve (*supra*, pp. 38–42). Even in its own frame of reference, however, Ford's argument does not withstand analysis.

The increase that Ford has been able to achieve in the market share held by Autolite is not the result of the "vigorous competition" that Ford purportedly added in the spark plug market (see Br. 35). Rather, it reflects the fact that the Ford market that Ford itself is now supplying is substantially greater than the Chrysler business that Electric Autolite had before the acquisition, and that the Chrysler business that Champion now has is substantially smaller than the Ford business it previously had. Moreover, despite this asserted "vigorous competition" that the acquisition has brought to the spark plug market, there has

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[26] Ford also suggests (Br. 35–36) that the divested enterprise cannot be expected to retain Ford's post-acquisition market share in the face of the competition the industry's dominant firms (Champion and General Motors) are certain to give it for this business. It was because of the impact of these two other firms in the market that the district court included the injunctive provisions going beyond divestiture, to give the divested plant the opportunity to capture a significant portion of the market now held by Ford.

been no active price competition or change in the pricing patterns in the aftermarket since the acquisition. Instead, the price of Ford-made "Autolite" spark plugs is virtually identical to that of the "Champion" and General Motors' "AC" brands (App. 761a, 778a). Thus, the increase in market share that Ford achieved reflects no increase in meaningful competition, but rather a mere rearrangement of market shares among the three dominant firms.

Ford also contends (Br. 34, 36–39) that divestiture was improper because the divested plant can succeed economically only if it retains Ford's OE business beyond the decree period, which would perpetuate the OE tie contrary to the district court's objective (*id.* p. 37); or, if the plant does not retain that business, it will not have a sufficient volume to succeed. The district court, however, declined to provide relief designed to end the OE tie [27] and even if the decree perpetuates the tie, that would be no different than the situation was before the acquisition. Moreover, the OE tie would be at least as strong if Ford continued to own the Autolite plant and name than if they were divested. The tie results from the promotional efforts in the industry, and would not be affected by a mere change in the ownership of Autolite. With respect to the second branch of Ford's argument, that without the Ford business the divested

[27] The district court rejected the government's suggestion that the relief "should be affirmatively designed to 'break the OE tie,'" on the ground that the purpose of its decree was to "correct the violations of Section 7 found by the court" and that "[t]he OE tie, as such, does not violate Section 7" (App. 780a).

plant cannot succeed, we show below that the injunctive provisions of the decree are designed to enable the new company to get on its feet and to prosper even if it lost all or a major portion of the Ford business at the end of the five-year period.

Ford further contends (Br. 46, 52–53) that the divested plant will be so weak financially that it will be unable to assure the high quality of its plugs, which in turn is essential to Ford's pollution control program. Ford's own witness recognized that many of its fears about the quality of the product produced at the divested plant would be "substantially minimized" if a well-financed, well-run and knowledgeable firm acquired the plant (App. 748a). Since Ford will have to look to the divested plant for a major portion of its requirements for the next five years, and perhaps longer, Ford obviously will have a strong interest in insuring that the purchaser meets those standards.

There is nothing in the record which indicates that divesture of the Autolite enterprise will interfere with Ford's pollution control program. Both Chrysler and American Motors, and Ford before the acquisition, presumably have been able to assure that the spark plugs manufactured for them by independent firms satisfied necessary quality standards. Ford's interest in insuring that the divested plant is financially strong, and the various injunctive provisions designed to accomplish that objective, refute Ford's argument (Br. 53) that the substantial risk of failure of the divested enterprise improperly jeopardizes the

welfare in the community in which the plant is located (Fostoria, Ohio).

As a result of the acquisition, the structure of the spark plug industry changed drastically. Ford, which before the acquisition was the largest purchaser of spark plugs from the independent manufacturers, itself became a major manufacturer. The result, as we have discussed above, was to foreclose to the remaining independent spark plug manufacturers the substantial segment of the market previously open to competitive selling and to remove the significant pro-competitive effects in the concentrated spark plug market that resulted from Ford's position on the edge of the market as a potential entrant.

To permit Ford to retain the Autolite plant and name and to continue manufacturing spark plugs would perpetuate the anticompetitive effects of the acquisition. In these circumstances, the district court rightly concluded (App. 778a) that "the only remedy that will effectively correct the sitution [brought about by the unlawful acquisition] is * * * divesiture."

B. THE DISTRICT COURT'S INJUNCTIVE PROVISIONS ARE APPROPRIATE

Divestiture of the Autolite plant and name, vital though it is to reestablish the market structure and competitive situation that existed before the merger, itself would not accomplish that objective. As a result of the acquisition, Ford has been a spark plug manufacturer for ten years, during which time it has gained significant advantages in that business that it had not previously had. It has acquired significant experience

in designing and manufacturing the special ceramic insulators needed for spark plugs and a competent engineering staff with a working knowledge of spark plug production (App. 148a, 152a–153a). It has a nation-wide distribution system that covers both independent outlets and franchised dealers, an asset which Ford itself regarded as essential for "successful participation in the replacement market" (App. 395a). Ford now utilizes these advantages in marketing a broad line of automotive replacement parts through independent channels, whereas before the acquisition it distributed these products almost entirely through its own franchised dealers.[28] These advantages also undoubtedly played a significant part in enabling Ford to increase its plug sales in the aftermarket (see n. 23, *supra*).

The injunctive provisions, which run for either five or ten years, were specifically intended to give the divested plant "an opportunity to establish its competitive position" (App. 780a). They are designed to neutralize temporarily the advantages which Ford obtained through the acquisition and which, if permitted to continue, would seriously jeopardize the divested enterprise's chance of reestablishing itself as a viable

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[28] Ford's sales through independent distributors prior to the acquisition were made only with respect to a very limited line of replacement parts, principally ignition and fuel systems parts (App. 315a–320a, 338a, 348a, 510a–513a). Distribution through this channel, which was undertaken in 1959 on a limited basis under the "Motorcraft" label and did not include spark plugs, had not proven successful by the time of the acquisition (App. 164a, 512a–513a).

spark plug producer and regaining a fair share of the market it had before the acquisition. They do not eliminate the advantages described in the preceding paragraph that Ford obtained and will retain as a result of the acquisition. The district court did not abuse its discretion in imposing these temporary restraints to achieve that purpose.

1. *The Prohibition Against Ford Manufacturing Spark Plugs for Ten Years.*

The purpose of divestiture is to restore Ford to the "customer" position it occupied before the acquisition. The ten-year prohibition against Ford manufacturing plugs is designed to give the divested company the opportunity to regain the market position it previously had. Ford's own witness testified that, prior to the acquisition, Ford was not on the point of becoming a plug manufacturer (App. 147a–154a). As the district court noted (App. 559a), a period of about five to eight years after a plant is in operation is required before the manufacturer can penetrate the replacement market by developing the OE tie. Five years after divestiture, Ford will be able to use its own brand name on OE plugs and to buy all its plugs from any source (see point 2 below). At that time, Ford can begin to lay the groundwork for entering the industry, if it decides to do so, by using its own brand name on original equipment to develop a significant penetration of the replacement market for that brand within five to eight years thereafter; by the latter time it will be permitted to manufacture plugs.

Ford has been manufacturing plugs, with all the attendant advantages already discussed, for ten years. It was not unreasonable for the district court to bar Ford from further manufacturing for a like period, in order to give the divested enterprise the opportunity to obtain a foothold in the market.

Contrary to Ford's suggestion (Br. 34, 39–41), the ten-year prohibition against manufacturing plugs will not diminish competition in the industry. The ban will not significantly undercut the pro-competitive influence that Ford previously had on the spark plug market. That influence was not, as Ford contends (Br. 33), "premised on imminence of Ford's entry", but rather was based on the overall effect of its presence at the market's edge, as the industry's leading customer (see *supra*, pp. 31–32).

2. ***The Prohibition Against Ford for Five Years Using or Marketing Any Plugs Bearing a Ford Trade Name.***

This provision similarly is proper in order to give the new enterprise an adequate opportunity to make its way in the market. The OE tie still is a predominant economic factor in the industry, and an independent manufacturer would be under a serious handicap unless it is an OE supplier under its own brand. If Ford were permitted to use its own brand name during the initial five-year period, it is reasonable to assume that Ford would install plugs with that name as original equipment in its new cars. The result would be a serious and perhaps fatal blow to the ability of the divested enterprise to become a strong

independent competitor in the spark plug market. The five-year prohibition against Ford using its trade name is designed to avoid that situation; it merely restores the situation that existed prior to the acquisition, when Ford was the largest spark plug customer and bought plugs from an independent manufacturer only under the latter's brand.

Ford contends (Br. 41–42) that a prohibition against the use of one's name has been upheld only where the name was used to deceive or confuse the public.[29] The cases that have involved such a prohibition have been principally in the field of unfair competition, where the gravamen of the offense is deceiving the public. The touchstone of equitable relief, however, is what is necessary to accomplish the objective of the suit. In unfair competition cases, where the deception is the use of the name itself, the prohibition is necessary to correct the deception. In the present case, the temporary prohibition upon the use of Ford's trade name on spark plugs it installs or sells is de-

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[29] In *United States* v. *International Business Machine Corp.*, 1956 CCH Trade Cases ¶ 68,245 (S.D.N.Y.), a consent decree prohibited a new IBM subsidiary (without any time limit) from using its parent's tradename or from employing any IBM employee (*id.* at p. 71,125). Moreover, since "each [antitrust] case * * * must stand upon its own facts" (*United States* v. *Union Pacific R.R. Co.*, 226 U.S. 470, 474) and the relief decree "model[ed] * * * to fit the exigencies of the particular case" (*International Salt Co.* v. *United States*, 332 U.S. 392, 401), the absence of direct judicial authority for such a provision would not be dispositive of its validity. Compare *International Boxing Club* v. *United States*, 358 U.S. 242, 253–262; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185–190.

signed to restore the preacquisition competitive structure of the market. It is no less an appropriate remedy than the permanent prohibition upon the use of one's name permitted in unfair competition cases.[30]

The prohibition is only temporary—for five years—and involves only a single item, spark plugs. Ford suggests, however, that the provision will encourage it "to withdraw from the independent aftermarket" and thus will threaten the survival of the divested plant (Br. 44; see, also, Br. 34, n. 20). There is nothing in the provision, however, that will require Ford to abandon the profitable aftermarket sales. It may elect to retain its present system for distribution of "Autolite" plugs through independent warehouses; if it does so, its 19 percent aftermarket share (App. 754a) will require sufficient purchases to sustain the divested plant. If, on the other hand, Ford discontinues the sale of "Autolite" plugs through its warehouse distributors, the divested plant can compete for and be expected to obtain these outlets to satisfy the aftermarket demand for that brand of plug.

3. *The Requirement That for Five Years Ford Purchase From the Divested Plant One-Half of Its*

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[30] Ford asserts that the court devised this provision "[w]ithout explanation, without a suggestion by the Government, and without the benefit of testimony or argument" (Br. 41). The government proposed, however, that Ford be required to purchase all its spark plugs from the divested plant under the "Autolite" name for three years, and a declining percentage thereof for the next seven years (App. 574). Implicit in the government's proposal was a ban on Ford's use of plugs bearing its own name for at least three years.

Annual Spark Plug Requirements under the "Autolite" Name.

Prior to the acquisition, Chrysler was a major customer of Electric Autolite, and Chrysler's use of Autolite plugs as original equipment gave Electric Autolite a significant entry to the replacement market. The provision requiring Ford for five years to purchase at least half of its spark plug requirements from the divested company under the Autolite label is designed to give the divested enterprise an assured customer, during the initial period while it is being reestablished as an effective independent competitor.

Without some assurance of a substantial market during this initial period, it is doubtful whether the divested company would be able to weather the uncertainties that beset every new enterprise. Under the decree, Ford is assured that the plugs it is required to purchase during this initial period will satisfy its own quality standards and are fairly priced; such plugs must "conform to Ford's designs, specifications, quality standards and delivery requirements and [must] be priced competitively" (App. 787a). Moreover, as previously noted, the divested plant will have a strong incentive to meet these two objectives, in the hope of obtaining more than half of Ford's business during the five-year period, and to retain or increase Ford's business thereafter.

One can never predict the precise operation of an antitrust decree designed to restore the competitive structure of an industry that was changed by an illegal acquisition. Of necessity, the formulation of such

a decree involves hypotheses and predictions as to future economic events. All that a court can do in such circumstances is to make its best judgment as to the likely impact of the decree upon the industry.

In the present case, the district court received extensive evidence in the hearing on relief relating to the appropriate measures for rectifying the anticompetitive consequences of the acquisition and the impact upon the market and the community of the various proposals suggested by the parties.[31] The court properly took account of the various public and private interests involved. For example, the decree protects the interests of the plant employees in Fostoria, Ohio, by requiring the purchaser of the plant to assume the existing collective bargaining contract and requiring Ford to offer reemployment to any employee displaced by a transfer of non-plug operations from the plant (App. 782a, 788a–789a).

The decree reflects the industry conditions shown by the record and is based upon the district judge's careful evaluation and considered judgment as to what steps offer the best possibility for curing the violation. It offers a reasonable prospect for restoring, and indeed for invigorating, the competition adversely affected by the acquisition. It should be upheld. See *United States* v. *du Pont, supra,* 366 U.S. at 334.

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[31] In addition to the evidence the parties presented, the court received evidence from representatives of Fostoria, Ohio relating to the impact of divestiture on that community (App. 782a).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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